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Belize it or not: implied terms in *Marks and Spencer v BNP Paribas*

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The Privy Council's advice on the implication of contract terms in *Belize Telecom* has, perhaps ironically, become an object lesson in the difficulties of interpreting a legal text.¹ It has been observed that Lord Hoffmann's analysis in *Belize* 'means different things to different people.'² Over two years after *Belize*, Arden LJ noted that the courts were 'probably still absorbing and ingesting' it.³ Unfortunately, before they fully worked off their meal, the courts have been pressed with *Marks and Spencer v BNP Paribas*, a case that is likely to leave them with digestive difficulties for some time to come.⁴

The express terms of a contract will often fail to provide for a certain set of facts. The court will usually find that this omission was deliberate: if something was meant to happen, the contract would have said so. In some cases, however, the court will 'imply a term in fact', finding that the

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¹ *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988.

² J. Carter and W. Courtney, '*Belize Telecom*: a reply to Professor McLauchlan' [2015] LCMLQ 245, 261.

³ *Stena Line Ltd v MNRPF Trustees Ltd & Anr* [2011] Pens LR 223, 232.

⁴ *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72.

contract really does provide for the issue, albeit implicitly.⁵ Before *Belize Telecom*, it was well-established that the court would only imply a term into a contract if it was necessary to give the agreement business efficacy, or if the term was so obvious that it went without saying (the latter often illustrated with the ‘officious bystander’ test). If neither test was satisfied, the loss would simply lie where it fell.

In *Belize*, Lord Hoffmann re-conceptualised these two tests as alternative formulations of the same question. He claimed that the implication of a term is primarily an exercise in the construction of the contract. The only question for the court is a fundamentally interpretative one: would the proposed implied term ‘spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean’?⁶ This formulation caused much anxiety. Did Lord Hoffmann mean to change the law, or simply to explain it? In *Marks and Spencer*, the Supreme Court apparently intended to clear this up once and for all. Alas, it has produced instead an even more gnomic judgment for the courts to grapple with.

A *Marks and Spencer in the lower courts*

Marks and Spencer had leased office space in The Point, a building in Paddington, from BNP Paribas. The rent was payable in advance on the usual quarter days. The lease was due to end on 2 February 2018, although the tenant had the right to determine the lease on 24 January 2012 by giving six months’ notice. This break notice would only be effective if the rent was not in arrears, and if the tenant paid a break premium of £919,800 plus VAT. It will be noted that the break date fell between two quarter days.

⁵ Terms implied in fact are a distinct category from terms implied in law, which are default rules for all contracts of a certain type.

⁶ n 1 above, 1994.

On 7 July 2011, the tenant served a break notice. On 25 December, it paid the full rent for the quarter up to 24 March, and on 18 January 2012, it paid the break premium. Both conditions having been satisfied, the lease duly determined on 24 January 2012. The tenant then sought repayment of the excess rent it had paid for the remainder of the quarter. It argued that a term should be implied into the lease that, if it exercised its right to determine the lease in the middle of a quarter, the landlord ought to repay an appropriate proportion of the rent.

At first instance, Morgan J upheld the tenant's claim.⁷ Citing *Belize Telecom*, he asked himself whether the proposed term would spell out expressly what a reasonable reader would understand the contract to mean.⁸ He observed that, had the break premium been paid before 25 December, so that it was certain at that date that the break notice would be effective, the tenant would have been entitled to pay only a proportionate part of the rent for the quarter. 'A reasonable person reading the lease' would expect this to be the case no matter when the break premium was paid.⁹ He also considered that the parties had intended the break premium to represent the full compensation due to the landlord. He concluded that 'the suggested implied term is necessary to give business efficacy to the lease,' and was 'obviously what the parties meant.'¹⁰

The judgment of the Court of Appeal was given by Arden LJ.¹¹ She agreed that the judge had applied the correct test: the question was whether the term would give effect to the meaning of the parties' agreement.¹² However, she found that the test was not satisfied on the facts of the case. It would have been obvious to the parties that this situation could arise, but they failed to

⁷ [2013] L&TR 31.

⁸ *ibid* [35].

⁹ *ibid*.

¹⁰ *ibid* [37].

¹¹ [2014] L&TR 26.

¹² *ibid* [21], [23].

provide for it.¹³ They must have known that, at common law, rent payable in advance is not apportionable in time.¹⁴ It therefore appeared that the gap in the contract was deliberate, and that the parties intended the common law rule to apply. There was no reason to think that the break premium was intended to compensate the landlord in full.¹⁵ Indeed, the excess rent could have been intended to compensate for the uncertainty caused by a later payment of the break premium.¹⁶ As a result, ‘the lease, read as a whole against the relevant background, would not reasonably be understood to include’ the proposed term.¹⁷

A **Marks and Spencer in the Supreme Court**

Until this point, there had been no doubt that *Belize Telecom* was anything other than authoritative. The issue was simply how it should be applied to the facts of *Marks and Spencer*. Somewhat surprisingly, then, the Supreme Court was unanimous in dismissing the appeal on the facts, but divided on the status of *Belize*. All five Supreme Court judges considered that the term should not be implied into the lease, although only Lord Neuberger gave reasons for this decision. He accepted that it seemed unfair that the landlord would retain ‘a pure windfall’ in the form of the excess rent,¹⁸ and that the tenant’s position would change depending on the date that the break premium was paid.¹⁹ On the other hand, the lease was ‘a very detailed document,’ drafted by expert solicitors and providing for a large number of contingencies.²⁰ It contained a carefully constructed set of provisions for the parties’ rights and obligations in relation to the

¹³ *ibid* [35].

¹⁴ *ibid* [37].

¹⁵ *ibid* [41].

¹⁶ *ibid* [42].

¹⁷ *ibid* [2].

¹⁸ n 4 above, [33].

¹⁹ *ibid* [35].

²⁰ *ibid* [38].

break clause. It would therefore be ‘inappropriate for the court to step in.’²¹ Furthermore, since it was well-established that the rent would not be apportioned at common law, it would be wrong to imply a term to the contrary ‘save in a very clear case indeed.’²² Any unfairness that this seemed to cause was no more than was inevitable under the general law.²³

The judges parted ways, however, over the role that *Belize Telecom* should play in their decision. The parties, while both accepting the authority of the case, had argued for different interpretations of Lord Hoffmann’s opinion. The tenant contended that *Belize* had ‘watered down’ the traditional tests for implying a term, the landlord that it had not. To resolve this dispute, Lord Neuberger, giving the majority judgment, embarked on a thorough overview of the law of terms implied in fact. He found that, prior to *Belize*, the courts took ‘a clear, consistent and principled approach.’²⁴ The test was one of ‘business necessity’: the term must be necessary to give business efficacy to the contract, or it must be so obvious that it would go without saying.²⁵ ‘A term should not be implied into a detailed commercial contract merely because it appears fair’ or reasonable.²⁶ He then turned to *Belize Telecom*, and to Lord Hoffmann’s test for the implication of a term: ‘is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?’ Lord Neuberger had ‘two points’ to make about this formulation.²⁷

B 1. *The legal test for the implication of a term is necessity, not reasonableness.*

²¹ *ibid* [40].

²² *ibid* [50].

²³ *ibid* [51].

²⁴ *ibid* [21].

²⁵ *ibid* [16]-[17].

²⁶ *ibid* [21].

²⁷ *ibid* [22].

For Lord Neuberger,

the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy... The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term.²⁸

Lord Neuberger considered it 'necessary to emphasise that there has been no dilution of the requirements which have to be satisfied before a term will be implied, because it is apparent that *Belize Telecom* has been interpreted by both academic lawyers and judges as having changed the law.'²⁹ He cited a number of academic commentators who have suggested that, post-*Belize*, a term may be implied where it is reasonable, and not just where it is necessary.³⁰ He also referred to the Singapore Court of Appeal, which has twice refused to follow what it saw as the rejection of the 'business efficacy' and 'officious bystander' tests in *Belize*.³¹ The Singapore court was, thought Lord Neuberger, 'right to hold that the law governing the

²⁸ *ibid* [23].

²⁹ *ibid* [24].

³⁰ C. Peters, 'The implication of terms in fact' (2009) 68 CLJ 513; P. Davies, 'Recent developments in the Law of Implied Terms' [2010] LMCLQ 140; J. McCaughan, 'Implied terms: the journey of the man on the Clapham Omnibus' (2011) 70 CLJ 607; and J. Carter and W. Courtney, n 2 above.

³¹ *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43.

circumstances in which a term will be implied into a contract remains unchanged following *Belize Telecom*.³²

It may seem odd that Lord Neuberger singled out the Singapore Court of Appeal for praise in this regard, when the English Court of Appeal has also found that the law on implied terms was unchanged by *Belize*. As Lord Clarke MR observed in *The Reborn*, Lord Hoffmann was ‘not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term. It is never sufficient that it should be reasonable.’³³ Lord Carnwath pointed out that the Court of Appeal has not departed from this analysis of *Belize* since.³⁴ The High Court has taken a similar approach.³⁵ Even critics of *Belize* admit that it does not seem to have changed the approach of the English courts, although they tend to portray this as out-and-out rebellion, rather than an entirely sensible application of the decision.³⁶

The temptation to assert that Lord Hoffmann was perfectly clear must be resisted, given the number of commentators who have found him to be perfectly clear in his support of a wide range of incompatible views. But to argue that Lord Hoffmann altered the test from necessity to reasonableness is to fixate on the adjective ‘reasonable’ without considering the noun to which it is attached. To ask what a ‘reasonable person’ must understand the contract to mean does not add much to asking what the contract must mean, given that the reasonable person is only a cipher for the court.³⁷ The real ambiguity arises from the fact that speaking of a test of

³² n 4 above, [24].

³³ *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] 1 CLC 909, 916.

³⁴ n 4 above, [63].

³⁵ D. McLauchlan, ‘Construction and implication: in defence of *Belize Telecom*’ [2014] LCMLQ 203, 228.

³⁶ P. Davies, n 30 above, 146.

³⁷ *Davis Contractors Ltd Appellants v Fareham Urban District Council Respondents* [1956] A.C. 696, 728.

‘reasonableness’ or ‘necessity’ is entirely unhelpful. As McCaughran has noted, it is simply incomplete; the real question we need to ask is: ‘reasonable or necessary *for what?*’³⁸ *Belize Telecom* answers: necessary to give effect to what a reasonable person would understand the contract to mean.³⁹

Carter and Courtney object that this is sneaking in reasonableness by the back door. ‘Reasonable people are apt to come to reasonable conclusions.’ Thus, a reasonable person is likely to imply a term, not only when it will give effect to the contract’s meaning, but also when it will give the contract a more reasonable meaning.⁴⁰ This must, they argue, mean that terms are easier to imply under *Belize Telecom*, despite Lord Hoffmann’s protests to the contrary.⁴¹ But they underestimate the abilities of the reasonable reader. A reasonable person, reading a detailed commercial contract, will begin from the assumption that the parties have expressed all the terms they intended to include.⁴² It will therefore be reasonable for her to require a very clear case for the implication of a term. Conversely, she would judge it unreasonable to imply a term just because it would make the contract fairer. That would betray a failure to understand the nature of commercial contracts, in which the parties deliberately attempt to express all of their intended meanings in a quest for predictability.⁴³ This basic fact about contracts, and not the talismanic word ‘necessity’, is the reason for the strict test applied in implication cases.

Now, as Hooley observes, reasonableness must be part of the endeavour.⁴⁴ We must construe the contract reasonably to see if an implied term is necessary to achieve its purpose. As Lord

³⁸ n 30 above, 612.

³⁹ n 1 above, 1994.

⁴⁰ n 2 above, 260.

⁴¹ *ibid* 261; see n 1 above, 1993.

⁴² A. Kramer, ‘Implication in fact as an instance of contractual interpretation’ (2004) 63 CLJ 384, 400.

⁴³ *ibid*.

⁴⁴ R. Hooley, ‘Implied terms after *Belize Telecom*’ (2014) 73 CLJ 315, 341.

Hoffmann pointed out in *Belize*, ‘a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean.’⁴⁵ Lord Neuberger accepted that this kind of ‘value judgment’ will inevitably be involved, given that the test is not one of ‘absolute necessity.’⁴⁶

Lord Carnwath agreed with the majority that *Belize* did not ‘water down’ the traditional standard of necessity. Oddly, however, he seemed to equate this standard with ‘absolute necessity (ie the contract simply will not operate without the term),’ rather than ‘reasonable necessity (ie the contract will not operate as it must reasonably have been intended by the parties to operate).’⁴⁷ But as Lord Neuberger observed, absolute necessity has never been the standard. In *The Moorcock*, for example, the contract would have been perfectly workable without the implied term: it would simply have thrown all the risk on the hapless shipowner, something the court presumed the parties could not possibly have intended.⁴⁸ It is not even clear what a standard of absolute necessity would look like. How ‘unworkable’ would the contract have to be before a term could be implied? Asking whether the contract would ‘work’ without the term is, effectively, begging the question.

The real danger is not that the courts will choose a test of ‘reasonableness’ over ‘necessity’. It is that they will allow themselves too much leeway in identifying what the term must be necessary to achieve. As Lord Gribner has warned, in both interpretation and implication cases, the court must find the meaning of the contract from the words used by the parties, not from their

⁴⁵ n 1 above, 1994.

⁴⁶ n 4 above, [21].

⁴⁷ *ibid*, [59].

⁴⁸ *The Moorcock* (1889) 14 PD 64.

own ideas of commercial common sense.⁴⁹ If this is done, we need not fear that *Belize* will elevate other indications of intention at the expense of the contract.⁵⁰

Belize, then, explained the relevance of necessity for the implication of terms; it did not dispense with it. The Supreme Court was unanimous on this point, and was right to quash concerns that it had done so.⁵¹

B 2. *Interpretation and implication are separate and sequential processes.*

It was in relation to Lord Neuberger's second point that the judges began to part ways. This concerned Lord Hoffmann's 'suggestion that the process of implying a term is part of the exercise of interpretation.'⁵² Lord Neuberger accepted that the construction of words and the implication of terms both 'involve determining the scope and meaning of the contract.'⁵³ However, he argued that they are 'different processes governed by different rules,'⁵⁴ and are carried out at different times.⁵⁵ The court cannot consider whether or not to imply a term until it has decided what the express words mean.⁵⁶ Furthermore, as Sir Thomas Bingham MR

⁴⁹ Lord Grabiner, 'The iterative process of contractual interpretation' (2012) 128 LQR 41, 49. Compare, for example, Lord Diplock in *Antaios Compania Naviera v Salen Rederierna* [1985] AC 191, 201.

⁵⁰ As worries P. Davies, n 30 above, 144.

⁵¹ n 4 above, [77].

⁵² *ibid*, [25].

⁵³ *ibid* [26].

⁵⁴ *ibid* [26].

⁵⁵ *ibid* [27].

⁵⁶ *ibid* [28].

observed in *Philips Electronique*, the implication of terms is a much more ‘intrusive’ exercise than interpretation, and must be strictly constrained.⁵⁷

For Lord Carnwath, the relationship between interpretation and implication was ‘an interesting debating point’, but ‘of little practical significance.’⁵⁸ He did, however, prefer the view that they are ‘two sides of the same coin.’⁵⁹ The court in *Philips* was not attempting to separate the two, but to emphasise that it will be an unusual case in which the court will imply a term.⁶⁰ Cases like *Aberdeen City Council*, in which the court treated implication and interpretation as ‘part of a single exercise,’ did not bear out the view that they were two separate and sequential processes.⁶¹ Rather, such cases exemplified what Lord Gribner has described as an ‘iterative’ process, in which possible meanings of the parties’ words are assessed against the whole of the contractual scheme.⁶²

Lord Carnwath’s approach is preferable here, and the point has more practical significance than he admitted. As Kramer has observed, implication is an inevitable part of communication. We cannot convey everything we mean expressly; we must rely on a shared background of norms and assumptions.⁶³ Contract law would be unable to function adequately without recognising this

⁵⁷ n 4 above, [29]. See *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995]

EMLR 472, 481.

⁵⁸ *ibid* [68].

⁵⁹ *ibid* [71].

⁶⁰ *ibid* [70].

⁶¹ *Aberdeen City Council v Stewart Milne Group Ltd* [2012] SLT 205.

⁶² n 4 above, [71]. See n 49 above, 45. Lord Neuberger accepted that, ‘in some cases’, such an approach ‘could conceivably be appropriate’ [28].

⁶³ n 42 above, 387.

reality. This is why Lord Hoffmann has insisted that contracts must be read and understood holistically.⁶⁴

Lord Neuberger objected that ‘to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.’⁶⁵ However, this assumes that a line can be drawn between express and implied terms, when in fact the two shade into each other. Where an implied term states the necessary meaning of the express terms, ‘the implication *is* the meaning, or part of the meaning, of [the express] terms.’⁶⁶ In *Aberdeen City Council*, for example, the court concluded that the meaning of the contract could equally be conveyed through a re-interpretation of the express terms, or by the implication of a new term.

If interpretation and implication are simply two ways of conveying meaning, to treat them differently is to create incoherence in the law. As Arden LJ observed in *Stena Line, Belize*

promotes the internal coherence of the law by emphasising the role played by the principles of interpretation not only in the context of the interpretation of documents *simpliciter* but also in the field of the implication of terms. Those principles are the unifying factor. The internal coherence of the law is important because it enables the courts to identify the aims and values that underpin the law and to pursue those values and aims so as to achieve consistency in the structure of the law.⁶⁷

⁶⁴ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 866, 913.

⁶⁵ n 4 above, [27].

⁶⁶ n 35 above, 209.

⁶⁷ n 3 above.

To this end, Kramer suggests, it would be better to see interpretation and implication as occupying positions on a continuous spectrum, rather than separate sides of a bright line.⁶⁸ And this would fit the existing law well. There is no ‘radical change’ from a standard of reasonableness in interpretation to one of necessity in implication.⁶⁹ Both doctrines require the court to do what is necessary to give effect to the meaning that the contract is reasonably understood to convey. It will simply be rare for the court to find that a detailed commercial contract conveys a meaning that is not set out in express words, just as it is rare to find that the parties did not intend the ordinary meaning of the words they used.⁷⁰ This explains the court’s cautious approach in *Philips Electronique*.

The divide between interpretation and implication is a superficial one. In fact, treating them as separate doctrines with different rules leads to incoherence, unpredictability and unprincipled law. It also fails to adequately explain the conceptual basis for implying terms. In interpretation cases, we could just as easily ask whether the proposed interpretation is necessary for business efficacy, or is obviously that intended by the parties. However, we recognise that, by themselves, these tests would fail to cut to the core of what such cases are really about: the search for the meaning of the contract. This applies equally to the implication of terms.

A *What next for implied terms?*

The Privy Council’s decision in *Belize Telecom* did not alter the substantive law; rather, it brought welcome coherence to it. It clarified that the traditional tests are not ends in

⁶⁸ n 42 above, 400.

⁶⁹ n 44 above, 332, quoting K. Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 5th ed, 2011) 275.

⁷⁰ Interpretation cases use the language of necessity too. For example, the court will depart from the natural and ordinary meaning of words only if “something must have gone wrong with the language”: n 64 above.

themselves, but part of a wider search for the meaning and purpose of the contract. It is therefore disappointing to have doubt thrown upon it now. For Lord Neuberger concluded his discussion of *Belize* with the following:

It is true that *Belize Telecom* was a unanimous decision of the Judicial Committee of the Privy Council and that the judgment was given by Lord Hoffmann, whose contributions in so many areas of law have been outstanding. However, it is apparent that Lord Hoffmann's observations in *Belize Telecom*... are open to more than one interpretation on the two points identified... above, and that some of those interpretations are wrong in law. In those circumstances, the right course for us to take is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms.⁷¹

It is not clear why Lord Neuberger thought that this was the 'right course' to take. If the issue was that some interpretations of *Belize* were wrong in law, surely it would have been easier to correct them, and reaffirm that Lord Hoffmann's opinion, properly interpreted, remained authoritative. It is an even more peculiar step to take if it is right that *Belize* did not change the law. And it creates new uncertainty: to what extent should the courts take into account the guidance offered by an unauthoritative but 'characteristically inspired discussion'?

It was on this treatment of *Belize* that Lord Carnwath dissented from Lord Neuberger's majority judgment. The court, he held, would 'need very good reasons for treating [*Belize*] as less than authoritative.' Although Lord Hoffmann's speech had 'stimulated more than usual academic controversy,' this was not 'a sufficient reason to question its continuing authority.' Indeed, 'properly understood,' it was 'a valuable and illuminating synthesis of the factors which

⁷¹ n 4 above, [31].

should guide the court.⁷² Lord Clarke agreed that *Belize* did not change the law, but did not express an opinion on its fate.⁷³

If *Belize* is to be disregarded, then, what happens next? Lord Neuberger did not explicitly set out the test that the courts should be using now that *Belize* is out of favour. The first part of his judgment suggests that he wished to return to the traditional tests, without overlaying them with what Arden LJ described as the ‘superstructure of interpretation’.⁷⁴ On this view, the court should ask whether the contract ‘would lack commercial or practical coherence’ without the implied term. Alternatively, it should ask whether ‘notional reasonable people in the position of the parties at the time at which they were contracting’ would regard the term as so obvious that it went without saying.⁷⁵ However, it should not engage with the broader interpretative question of the contract’s overall meaning.

To some extent, this approach is borne out by his analysis of the facts of *Marks and Spencer*. Lord Neuberger reaffirmed that the question was whether the term was ‘necessary for business efficacy’.⁷⁶ However, he did not fully explain why this test was not satisfied on the facts, instead substituting it with a range of similarly stern phrases. For example, the court would not imply a

⁷² *ibid* [74].

⁷³ *ibid* [77].

⁷⁴ *Groveholt Ltd v Alan Hughes & Anr* [2010] EWCA Civ 538, [45].

⁷⁵ [21]. It has been suggested that *Belize* was innovative in moving from a subjective to an objective ‘officious bystander’ test: P. Davies, n 30 above, 142. *Marks and Spencer* has affirmed at least this part of Lord Hoffmann’s analysis. Lord Neuberger held that, strictly speaking, the tests of business necessity and obviousness were alternatives, but thought that ‘in practice it would be a rare case where only one of those two requirements would be satisfied’ [21]. Indeed, once the question is put to notional reasonable parties, the two tests are essentially interchangeable.

⁷⁶ n 4 above, [37].

term where there was only ‘an arguable lacuna’;⁷⁷ there must be ‘a very clear case indeed.’⁷⁸ It was not sufficient that the contract would work ‘rather unfairly’ without the implied term,⁷⁹ nor that its result was ‘somewhat curious... capricious or anomalous.’⁸⁰ Instead, the contract must be ‘unworkable,’ in the sense that it was ‘commercially or otherwise absurd.’⁸¹ By finding that the lease without the term was merely ‘capricious’ rather than ‘absurd’, Lord Neuberger held that the business necessity test was not satisfied. But Lord Carnwath, as well as the three Court of Appeal judges, had reached the same conclusion by applying the test in *Belize Telecom*. What difference did Lord Neuberger’s approach really make?

Unfortunately, Lord Carnwath did not explain his reasoning process, simply agreeing with Lord Neuberger on the facts. However, it is clear that he thought the *Belize* approach involved a less rigid application of the traditional tests, rooted in the broader question of the contract’s meaning.⁸² In the Court of Appeal, Arden LJ gave noticeably more time to considering what the purpose of the contractual provisions might have been, as did Morgan J, applying *Belize* at first instance. Both, for example, asked what the aim of the break premium was intended to be. Lord Neuberger, however, preferred to consider whether the contract functioned as a rational free-standing scheme. He focused on what was necessary to give the contract ‘commercial or practical coherence’, rather than what was ‘necessary to achieve the parties’ objective in entering

⁷⁷ *ibid* [40].

⁷⁸ *ibid* [50].

⁷⁹ *ibid* [49].

⁸⁰ *ibid* [51].

⁸¹ *ibid*. It is instructive to compare this list of adjectives to one offered by Neuberger LJ in the context of interpretation: the court will depart from the natural meaning of the term if it is ‘plainly ridiculous or unreasonable,’ but not if it is merely ‘somewhat unexpected, a little unreasonable, or not commercially very wise’: *Skanska Rashleigh Weatherfoil v Somerfield Stores* [2006] EWCA Civ 1732, [21]-[22].

⁸² n 4 above, [73].

into the agreement.⁸³ The danger here is that the courts may prioritise their own notions of reasonableness over the parties' objectives in making their contract: exactly what Lord Gribner warned against.⁸⁴

As Peden has observed, the traditional approach to implied terms encouraged judges to set out the two tests and then their conclusions, without explaining the reasoning process that connected the two.⁸⁵ Lord Neuberger's approach may do the same. At least *Belize* required the courts to clarify the objectives to which they were giving business efficacy. It has been argued that downgrading the traditional tests led to greater uncertainty in the law, but certainty does not consist of some rote phrases that disguise the true reasons for a decision. In any case, certainty is not the only aim of contract law. When asking questions about meaning, a high level of certainty cannot be reached 'without sacrificing fairness and justifiability.'⁸⁶

Mitchell has identified *Belize* as part of a trend in which emphasis shifted from free-standing rules of contract law to a greater focus on the interpretation and application of the contract itself.⁸⁷ It is possible that its rejection in *Marks and Spencer* marks the beginning of the end of contract law's 'interpretative turn'. Admittedly, implication of terms was always an outlier in this trend, given that the traditional rules also stress fidelity to the parties' intentions.⁸⁸ However, pronouncements that interpretation ought to know its place certainly run counter to the trend of recent decades. Perhaps contract law is now prepared to reassert itself as a means of shaping

⁸³ n 11 above, [28].

⁸⁴ n 49 above.

⁸⁵ E. Peden, *Good Faith in the Performance of Contracts* (Australia: LexisNexis Butterworths, 2003) ch 4, cited in n 35 above, 225.

⁸⁶ n 42 above, 405.

⁸⁷ C. Mitchell, 'Obligations in commercial contracts: a matter of law or interpretation?' [2012] Current Legal Problems 455, 464.

⁸⁸ *ibid*, 465.

obligations, rather than simply discovering and implementing them.⁸⁹ However, any attraction such a development might hold depends on its doctrines being clear, consistent and principled. Alas, that is not the case here. *Marks and Spencer* has swept away the theoretical basis for terms implied in fact without putting anything in its place.

The Supreme Court reached the correct decision on the facts of *Marks and Spencer*. Given the length of the contract (some 70 pages), it would have been very strange if the parties had left such a significant term to implication. But this decision could have been reached in a more conceptually satisfying way if the majority had followed Lord Hoffmann's approach wholeheartedly.

Great things were initially prophesied for *Belize Telecom*. Lord Clarke MR thought that it would be 'as much referred to' as *Investors Compensation Scheme*.⁹⁰ It will be a great shame if it is left to languish in obscurity now. While not substantially changing the law, it brought clarity and coherence to an area where these were sorely lacking. If judgments are to be jettisoned simply because they stimulate academic debate, there would be no law worth having. It is not clear why Lord Neuberger felt the need to throw cold water over *Belize*, but it is to be hoped that Lord Hoffmann's incisive and helpful analysis will continue to influence the courts regardless.

4506 words (*inc. footnotes*)

5327 words (*exc. footnotes*)

⁸⁹ It may be significant that another recent Supreme Court case, *El Makdessi v Cavendish Square*

Holdings BV & Anr [2015] 1 WLR 1373, reaffirmed the traditional rule against penalties in the face of arguments that the parties' agreement ought to prevail.

⁹⁰ n 33 above, 913.